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Title: Collective guilt, individual and prospective responsibility: a critical approach to contemporary transitional justice

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Collective guilt, individual and prospective responsibility: a critical approach to contemporary transitional justice

Gianluca Ronca[1]

Abstract

Beginning with a brief presentation of the historical data and conceptual issues that have led to the emergence of the doctrine of the notion of Transitional Justice, I will describe the orientation adopted in two paradigmatic historical contexts, the Nuremberg trial at the end of the Second World War and the post-apartheid reconciliation process in South Africa. Supported by documents from International Human Rights Law and other international legal sources (Rome Statute) I will then offer a provisional definition of what I call a Critical Transitional Justice. The conclusion highlights how the relationship between retrospective and prospective responsibility today is not exclusionary: as central principles of Critical Transitional Justice, they contribute in conferring normative legitimacy to transformative processes of adapting the international system to compliance to general principles of human rights.

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This essay has a limited purpose and will attempt to shed a different light on the philosophical approach to transitional justice. Rather than setting out to delineate a detailed and consistent overall interpretation, I will choose a single conceptual element that I will use to justify what I call critical theory of transitional justice. I will proceed by posing the key normative question, before I investigate its historical articulation through two theoretical models. In the concluding section I will investigate a possible solution to the apparent aporia that is brought into relief by a critical study of contemporary international law charters.

I. Who is accountable?

We begin by posing the following preliminary question: Who is accountable for the violation of international crimes and before what lawful authority? The logical consequence of providing a convincing answer would be to offer an acceptable normative definition of accountability in the face of such crimes. Our intention here is precisely to move these questions towards a fruitful dialectical confrontation with the issues of historical memory and blame.

The literature on the subject tend to distinguish two types of responsibility on account of the party held accountable (individual or collective), three on account of the instance

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interrogating our conduct (legal, moral, political), and two on account of the temporal frame of reference (retrospective or prospective responsibility).[2]

The term responsibility in legal terms originally indicated a response that we carry with us as a guarantee to someone. If we dwell on the etymology of the term "responsibility," it is clear that one is always accountable to someone, even before one is accountable for something.[3] The subject therefore has specific duties to the other with whom he enters into a privileged relationship from the moment he announces a promise. To understand the nature of the problem we must first provide a minimal taxonomic overview.

In the literature we find definitions of a) a *prospective* conception of responsibility – as that which dwells on the future consequences of taking responsibility, and of b) a *retrospective* conception of responsibility, that is, the causal attribution of an action to a moral agent. A key term in the literature is that of *imputability*.[4] My motivation for questioning the problem lies in the realisation that agents cannot reasonably be conceived of as moral monads but rather as interconnected through a variety of relationships. They act in such a way that the actions of single individuals have considerable consequences for the intentions and actions of other moral subjects, especially when they share a sense of historical affiliation.[5] Building on these considerations, I want to focus on the precise character of the relationship between individual and collective responsibility in reference to serious violations of international law. As we find ourselves in a historical phase of crisis and transformation for the socio-political structure that responds to such violations, I return to the classical distinction between two models of corrective justice. In an attempt to go beyond innumerable cases of specific articulations, while also grasping its fundamental theoretical core with reference to international crime violations, we consider *retributive* justice as an approach devoted to the definition of attribution of responsibility and fair sanctions to be administered to offenders, and *restorative* justice as concerned with compensatory, diverse methods aimed at redressing the wrong, and at rehabilitating the victim and restoring the socio-moral relationship prior to the violation.[6]

II. Restorative and retributive justice

Let us exemplify these two models with two historical episodes from the twentieth century. We should point out that, once the researcher's gaze is sharpened, these models never present themselves in their structural purity. We therefore understand the models as ideal-types (*à la* Weber) from which we can draw useful philosophical inferences. In both cases, instances of a privileged theory of justice were accompanied by as many examples of the practice of opposing models of justice.

At the end of World War II, many among the Allies and beyond began to wonder to what extent the German people could be held respon-

[2] A by now classic introduction to the topic is Joel Feinberg, *Doing and deserving* (Princeton, N.J: Princeton University Press, 1970).

[3] Émile Benveniste, *The Vocabulary of Indo-European Institutions* (Vol. I, Turin: Einaudi, 1976), 446 ff.

[4] "The subject is said to be responsible for some event in the past. This can be called retrospective responsibility. In contrast, the first usage looks to the future .... This can be called prospective responsibility," in Michael S. Moore, *Law and Psychiatry* (Cambridge: Cambridge University Press, 1984), 50.

[5] For further depth on this debate, see Marion Smiley, "Collective Responsibility", http://plato.stanford.edu/archives/fall2011/entries/collective-responsibility/.

[6] See, for example, Andrew von Hirsch, Julian Roberts, Anthony. E. Bottoms, Kent Roach and Mara Schiff *Restorative justice and criminal justice: Competing or reconcilable paradigms?* (Portland, Oregon: Hart Publishing, 2003).

sible for Nazi crimes. This is an issue that has concerned a number of philosophers, among them Karl Jaspers and Hanna Arendt. Both were convinced that precisely by virtue of belonging to the same political community, all German citizens should be held collectively responsible and make reparations to those who had been persecuted by the Nazi regime. However, they tended to distinguish moral guilt from responsibility: the latter arose from an attribution based on "sociability among fellow citizens" rather than on attribution of individual actions or intentions of agents.[7] We can justify the moral cogency of social loyalty and responsibility by observing that their appearance is [also] derivative of our subjective "situation" in a defined space- time.

We are, in short – and here the communitarians have valid reasons on their side – members of a family, a nation, and a community: the composite identity resulting from this cannot be indifferent at the moment of ethical deliberation.[8] Although Nuremberg represented the persecution of criminals recognized as such by a legal process, for Jaspers this did not preclude the assumption of a type of guilt on the part of the German people. To him, Germans were citizens, now having become subjects, of a state that continued to call itself "German" and that did not encounter any kind of domestic resistance until at least 1943[9]: a people is evidently accountable for its political life as well. In the face of crimes committed in the name of the Reich, every German is, therefore, "collectively 'responsible' ".[10] This statement is valid for as long as one is clear about the distinction between responsibility and guilt, since "holding someone responsible is not the same as declaring them morally guilty."[11] To Jaspers collective guilt is defined as citizens' political responsibility: this distinction – between responsibility and guilt – is fundamental in his economy of thought. I believe he makes a legitimate argument: political responsibility, collective in nature, entails a duty for each person to contribute to the reparations established.

However, the Nuremberg model favored a penal approach to international crimes, laying the foundation for the formulation of international human rights law[12], a cornerstone of contemporary international law. This was the trial of the most prominent members of the Nazi regime, namely political, military, judicial and economic leaders accused of international crimes. By "Nuremberg Trial" we commonly mean the first trial, the one we are most interested in, conducted by the International Military Tribunal on the basis of the so-called London Charter, and a series of trials of middle-ranking criminals in the hierarchical ladder conducted by the U.S. Nuremberg Military Tribunal under the aegis of Control Council Law No. 10. The charges enumerated were four counts: 1) participation in a common plan or conspiracy aimed at the perpetuation of a crime against peace; 2) planning, initiat-

[7] For more background on this by-now standard distinction in the literature on responsibility, see Jünger Habermas and Adam Michnik, "Overcoming the past," *New Left Review*, no. 203 (1994): 3-16; cf. Allard Schaap, "Guilty subjects and political responsibility: Arendt, Jaspers and the resonance of the 'German Question' in politics of reconciliation," *Political Studies*, no. 49 (2001): 749-766.

[8] Cf. Alasdair MacIntyre, *After Virtue* (Notre Dame, Indiana: University of Notre Dame Press, 1981).

[9] Karl Jaspers, *La questione della colpa*, ed. A. Pinotti (Milan: Cortina Editore, 1996), 80.

[10] *Ibid.*

[11] *Ibid.*

[12] This term refers to the normative complex that relies on several legal sources from the Universal Declaration of Human Rights (1948) onwards. Previously, the human rights system had an international normative basis – albeit limited to some specific areas of international law and generally only partially recognized by global actors. This latter framework was produced in the aftermath of the Hague and Geneva conferences (Conventions of 1899 and 1907).

ing and conducting wars of aggression and committing other crimes against peace; 3) war crimes (definition of genocide); and 4) crimes against humanity. Twenty-four defendants and seven organizations liable to be referred to precisely as "criminals" if they were found guilty were taken to the stand.

The Allied IMT claimed the repression of international crimes recorded since the rise of the Nazi regime[13] by laying the groundwork for legal principles now considered to be at the vanguard of the international law system. The principles included the recognition of individual responsibility alongside the international responsibility of states, thus embracing a principle already valid in state criminal law, that legal systems as well as individuals can bear criminal responsibility. Defendants found guilty of the crimes drafted in the London Charter were prosecuted by an international jury set up by the victorious powers of World War II. Three "collective organizations" were acquitted precisely on the ground that they, as institutions, were not reducible to the criminal actions perpetrated. Instead, anyone who took part in the activities of the offending organizations was subject to sanctions. The work of the IMT can thus be interpreted as a clear example of retributive post-war justice.[14]

III. The challenge of transitional justice

We now turn to consider a restorative model of justice: the case of the Republic of South Africa. The country rejected all international interference in the accountability process for crimes committed during apartheid by establishing, in 1995, a completely innovative body of justice: the South African Truth and Reconciliation Commission. The restorative model, with reference to violations of international law, initially developed from national legal systems and spread as an alternative model of justice centered on the recognition of crimes through collective rituals such as public confession of crimes, listening to victims' testimonies in a special forum and public forgiveness. Such restorative and reconciliatory dynamics have challenged the traditional conception of retributive justice characterized by the centrality of the criminal trial and the moment of punishment, following the internationally established "duty to prosecute" principle.

During the last two decades of the twentieth century, numerous countries in Latin America, Eastern Europe, and Africa witnessed the disintegration of authoritarian regimes and the emergence of a new socio-political order through modalities that have been termed "negotiation," that is, through processes of profound structural and constitutional transformations that were more or less agreed upon and sometimes even nonviolent. The norm that was being established during the transitional process came to be increasingly identified with the norm that legitimized the new political order. What dilemmas did the participants of such constituent processes face?

Let us first consider the dilemmas associated with the transition of bureaucratic-administrative apparatuses from one regime to another, before we go on to discuss some more purely theoretical and political issues.. The dilemmas are as follows

- How do we determine personal criminal responsibility for crimes committed in the past?
- How do we establish a shared collective memory?

[13] Those crimes were not included in the Nazi legal system, and they were not implemented in any other national or international jurisdiction.

[14] I suggest only the following volumes: Kim C.Priemel and Alexa Stiller (eds.), *Reassessing the Nuremberg Military Tribunals* (Berghahn Books, 2012), and Herbert Reginbogin and Christoph J. M. Safferling, *The Nuremberg Trials: International Criminal Law Since 1945* (Boston: De Gruyter, 2006).

- What truths should be taken into account in a time of transition?

In this essay, however, I intend to consider the first two points. The international community has during the last decades witnessed a proliferation of international transitional instruments of justice, such as the ad hoc International Criminal Tribunal for the former Yugoslavia (ICTY, 1993), the International Criminal Tribunal for Rwanda (ICTR, 1994), and others. In 1997 the report commissioned by the UN to thwart international impunity for war crimes and crimes against humanity, the so-called Joined Principles, was published, organically establishing those rights to justice, truth and reparations that are now the benchmark of all transitional trials.[15] Finally, the International Center for Transitional Justice (ICTJ) opened from 2000, a crucial inauguration that was welcomed by human rights NGOs. In an important text from 2000, Ruti Teitel makes use of the expression 'transitional justice' as a category to describe 'the conception of justice in periods of political transition.'[16] With it, transitional justice has become a subject of international research questioning academics and activists on the methodologies to be pursued, how to collect data and giving the scholarly official philosophical status.

The South African *Truth and Reconciliation* Commission (TRC) was an extra-ordinary para-judicial commission, not provided for in the previous constitution, whose distinctive practices included the pursuit of a non-sanctioning justice that prioritized the care of victims and the community as a whole through the pursuit of appropriate forms of reparations that tended toward the reconciliation of victims and perpetrators. The commission was founded as a result of the *Promotion of National and Reconciliation Act* of 1995. Based on Nelson Mandela's extraordinary political action, the TRC was chaired by Archbishop Desmond Tutu. It consisted of three committees: the Committee on Human Rights Violations, the Committee on Rehabilitation and Reparations, and the Committee on Amnesty. In that particular post-apartheid context, with the state delegitimized de jure as well as de facto , was assigned to occupy the back stage, leaving the proscenium to civil society. That is why South African justice was mostly coordinated by non-governmental agencies whose task was to collect, screen, file, research, and identify victims in order to restore to them the centrality they might have lost in a criminal trial.

In our context, the South African example provides a useful demonstration of how the truth about the past can be reconstructed, and how a society can establish a shared collective memory. TRC became formally and substantially an integral part of the new constitution for the new, democratic South Africa. The transition, characterized by negotiations between the parties that had faced each other during previous decades, made it possible to experiment with a particular, though not entirely novel, model of justice.

The TRC was endowed with considerable powers: its statute provided for the possibility of granting amnesty to all those who had committed ideological or political crimes between 1960 and 1998, those whose acts were justified (or motivated by) on political and racist grounds as long as they were willing to publicly "confess" to these crimes. The founding principles of the Commission were directly absorbed into the 1993 constitutional charter of 1996. Today in the preamble we read:

> We, the people of South Africa,
> Recognise the injustices of our past;

[15] See Louis Joinet (UN), *The Administration of Justice and the Human Rights of Detainees: Question of the Impunity of Perpetrators of Human Rights Violations*, cited in Arthur Paige, "How 'Transitions' Reshaped Human Rights," *Human Rights Quarterly,* no. 31 (2009): 353.

[16] Ruti Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000), 3.

> Honour those who suffered for justice and freedom in our land;
> Respect those who have worked to build and develop our country; and
> Believe that South Africa belongs to all who live in it, united in our diversity.
> We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to
> Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
> Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
> Improve the quality of life of all citizens and free the potential of each person; and
> Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations[17]

South Africa's commitment to the transition process was a true political experiment whose success is still widely debated.[18] From our point of view, it is useful to emphasize how much the process of ascertaining truth and accountability did not simply adhere to the criminal logic of mere retribution. The ultimate ground, as well as the starting point for the attribution of responsibility, was the South African community as a whole.[19]

IV. Transitional justice today

I believe that the apparent aporias in the literature between individual and collective responsibility, as well as between political and legal responsibility, are largely due to a careless non-technical use of terms. When we encounter cases that are similar to those cited above, we may benefit from critically interpreting the concept of accountability employed in transitional justice practices. I would emphasise that the sources of international law today contain useful criteria for combining various normative requirements that each are of the greatest concern. Here I will only provide a sketch a critical approach grounded in a holistic perspective on *transitional justice*, interpreted as an idea of justice not reducible to classical normative and corrective theories. My view is that this framework enables us to find solutions to the main challenges that arise from the nature of accountability. The taxonomies outlined above can inform an entire theory of transitional justice. Beyond these fundamental legal-institutional principles we further include explicit normative guidelines from recent international legal documents on the subject. These are important because they testify how principles of transitional justice are now envisaged and discussed in international law. I will point to three *loci*:

[17] The South African constitution is available at https://www.gov.za/documents/constitution-republic-south-africa-1996.

[18] For a reconstruction of the Commission's activities and the debate that followed, see, e.g., Desmond Tutu, *No Future Without Forgiveness* (New York: Image Books, 2000); Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa* (Cambridge: Cambridge University Press, 2001); Claire Moon, *Narrating Political Reconciliation* (Lanham: Lexington Books, 2008); Antjie Krog, *Country of My Skull* (New York: Three Rivers Press, 2000); and Priscilla B. Hayner, *Unspeakable Truths* (London: Routledge, 2010).

[19] There have been many critics of the restorative justice model exemplified by South Africa's Truth and Reconciliation Commission . It is evident, even from the framework outlined so far, that there are many problems of compatibility between restorative justice and remedies that are grounded in substantive and procedural principles of criminal law. The philosophical approach in this essay is an attempt to chart a direction beyond the mere opposition of these models of justice. The South African approach has now become widely accepted as providing valid principles for declarations of global human rights.

Case 1:

The 2017 UN Secretary-General's report:

> I encourage States to ensure that those responsible for atrocity crimes in their territory are prosecuted. If they fail to do so, I encourage the international community to consider all legal options and practical steps to ensure justice for all victims and contribute to the prevention of future violations. *In societies that have experienced atrocity crimes, a fair and inclusive transitional justice process can help prevent relapse into further violence or crimes. Transitional justice initiatives can encompass judicial and non-judicial mechanisms, including criminal investigations and prosecutions, reparations, truth-seeking and institutional and legal reform.* They can address the root causes of tensions by promoting truth-telling and ensuring accountability and access to justice. Addressing past grievances and violations can help to restore the dignity of victims, acknowledge and facilitate … regional and subregional human rights mechanisms can help to prevent atrocity crimes by identifying potential risks, recommending actions and supporting capacity-building. Some mechanisms might also receive and consider complaints from individuals or groups, or review relevant national legislation.[20]

Case 2:

The Human Rights Council's resolution on human rights and transitional justice from 2016 outlines a a direction for international, transitional justice to be pursued on all levels (local, transnational, global):

> 1. *Reiterates the responsibility of each individual State to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity*, which entails the prevention of such crimes, including their incitement, through appropriate and necessary means … 4. *Calls upon States, where relevant, to develop comprehensive transitional justice strategies and to establish judicial and non-judicial mechanisms in order to address past atrocities, the needs of victims and their right to an effective remedy, and to prevent their recurrence;* 5. *Encourages* States and international organizations to acknowledge and support the important role of civil society in the prevention of gross violations and abuses of human rights and serious violations of international humanitarian law, including genocide, war crimes, ethnic cleansing and crimes against humanity, and, where relevant, in the promotion and monitoring of comprehensive transitional justice approaches and efforts.[21]

Case 3:

The continuous cross-reference within the sources of international law, extending from collective responsibility to individual respon-

[20] United Nations Secretary General, "Implementing the responsibility to protect: accountability for prevention", available from https://www.un.org/en/genocideprevention/documents/2017%20SG%20report%20on%20RtoP%20Advanced%20co My italics.

[21] Pablo de Greiff, "Human rights and transitional justice", *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, available from https://digitallibrary.un.org/record/803412. My italics.

sibility and vice versa: art. 25 para. 4 of the Rome Statute, arts. 31-37, 57 and 58 of the draft on the international responsibility of states.[22]

These sources do not reduce the concept of responsibility for international crimes to that of imputability, nor do they narrow the semantic field to their own retrospective content. A theory of justice must be able to support considerably different responses in times of conflict and transition than classical normative and realist approaches can account for.

V. Conclusion

A proposal contemplating critical *transitional justice* can lead us to think about the potential for law to play a transformative part, even within an apparently non-confrontational institutional framework. In this way, critical transitional justice can provide us with principles that can serve to legitimize practices that go well beyond the logic of sanctions instituted by states. Some scholars have referred to cases similar to those we have cited as true "transitional constitutionalism."[23] I would note that a critical approach to transitional justice is the potentially most robust tool at our disposal.

Transitional constitutions, such as in the case of the South African constitutions of the 1990s, tend to have the capacity to not only retrospectively justify the moral meaning of the struggle for the recognition of rights, but also to promote transformation by laying down the purpose of institutional action. The methods of transition can, in turn, be interpreted as a further test of the legitimacy of political struggle.[24] In times of crisis and transformation transitional constitutionalism possesses a moral and political legitimacy that goes beyond classical constitutionalism . Transitional judgment is a manifestation of moral virtue. At once plural and non-consensual it is the outcome of debate and deliberation. Here I have shown that retributive principles do not provide exclusive answers in adequate response to serious collective crimes.

Restorative theories can make sanctions less potent by legitimizing a "double binary of justice" that is incompatible with what we usually take to mean a *rule of law*. A critical approach to transitional justice allows us to clear away many misunderstandings; without a due process that enables us to clearly distinguish individual responsibility, an institutional response would be unjust, and without communal assumptions of reparation, and without commitments to non-repetition of the crime, such process would remain short-sighted.

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[22] United Nations. "Rome Statute of the International Criminal Court, art. 25(4) ; Draft Articles on Responsibility of States for Internationally Wrongful Acts," Articles 31-37, 57, 58, in ILC. "Report of the International Law Commission on the Work of Its Fifty-Third Session", available from https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf.

[23] Harald Eberhard, Konrad Lachmayer and Gerhard Thallinger, *Transitional Constitutionalism* (Baden-Baden: Nomos, 2007).

[24] The legitimacy of revolutions from a constitutional point of view is still much debated. Let us only point to John Rawls's theory of the legitimacy of civil disobedience in *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), chs. LV and LIX.

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